

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

T-MOBILE USA, INC.

and

Case 28-CA-148865

**COMMUNICATIONS WORKERS OF
AMERICA LOCAL 7011, AFL-CIO**

**GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S CROSS EXCEPTION**

**TO: Gary W. Shinnars, Executive Secretary
Office of the Executive Secretary**

Respectfully submitted,

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I. INTRODUCTION

Counsel for the General Counsel (General Counsel) files this Answering Brief in response to Respondent's cross exception to the decision of Administrative Law Judge Amita Baman Tracy (the ALJ) in JD (SF)-49-15, dated December 10, 2015 (ALJD). The ALJ found that T-Mobile USA, Inc. (Respondent) violated Section 8(a)(1) of the Act by promulgating and maintaining a rule that unlawfully restricted senior representatives from talking to other employees about the Communications Workers of America, Local 7011, AFL-CIO (Union) while working but not prohibiting them from talking about other subjects. (ALJD at 25:1-3)

In its cross exception, Respondent contends that the notice language ordered by the ALJ for the violation was overly broad and inconsistent with applicable Board law. In conjunction with its cross exception, Respondent proposed notice language it claims will address this concern. The argument raised by Respondent does not warrant the notice language ordered by the ALJ to be changed. The General Counsel urges the Board to deny Respondent's cross exception and adopt the ALJ's findings that Respondent violated the Act as alleged, except as argued in the General Counsel's Exceptions.

II. RESPONDENT'S CROSS EXCEPTION IS WITHOUT MERIT

A. **The ALJ correctly ordered Respondent to inform employees by posting that it will not promulgate workplace rules that prohibit senior representatives from talking about the Union while working.**

Respondent contends in its cross exception that the ALJ erred by directing Respondent to post a NOTICE TO EMPLOYEES that included, among other things, language requiring Respondent to represent to employees that it would not promulgate and maintain a rule prohibiting senior representatives from talking about the Union while working. In its cross exception, Respondent takes umbrage with the phrase “*while working*” being included in the paragraph, arguing this language was overly broad and limited employer action in a manner inconsistent with applicable Board law. Respondent argues that Board law provides employers may promulgate rules that prohibit Section 7 activities during “working time” or “work time” because these terms “connote the period of time spent in the performance of actual job duties. *Essex Int’l, Inc.*, 211 NLRB 749, 750 (1974).

Respondent’s cross exception has no merit and reflects a lack of understanding of the violation found against it and the action necessary to remedy it. It is well established that an employer violates Section 8(a)(1) when employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced in specific response to the employees' activities in regard to a union organizational campaign. *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB No. 90, slip op. at 6-7 (2011); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Teledyne Advanced Materials*, 332 NLRB 539 (2001) citing *BJ's Wholesale Club*, 297 NLRB 611, 615 (1990). Here, the ALJ correctly found that Respondent promulgated and maintained a rule that prohibited its senior representatives from talking about Union matters while allowing employees to talk to each other about other nonwork related matters and correctly found this

overly broad and discriminatory rule to be in violation of Section 8(a)(1) of the Act. (ALJD at 25:1-3)¹ Respondent filed no cross exceptions for the ALJ's finding of the violation.

As Respondent has been found to have committed an unfair labor practice in violation of the Act, it is required to take actions necessary to effectuate the policies of the Act. To this end, the appropriate remedy for a rule found unlawful requires Respondent to rescind the rule and inform employees that it has done so and provide assurances to employees that will not promulgate such a bad rule in the future. *Alle-Kiski Medical Center*, 339 NLRB 361, fn. 2 (2003); *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 362 NLRB No. 190, slip op. at 6 (2015) (Board found that Respondent revising or rescinding an unlawful rule is the standard remedy unlawfully promulgated rules to assure that employees may engage in protected activity without fear of being subjected to the unlawful rule).

As a means to remedy the unlawful rule found in this matter, Respondent simply needs to rescind it and let employees know it has done so and that it will not promulgate such rules in the future. The reference by the ALJ to the prohibitive Section 7 rule being directed to employees "while working" is an accurate reflection of what was communicated to employees during the promulgation. It is not disputed that in their job duties senior representatives are always talking throughout a shift with customer service representatives (CSRs) about nonwork topics in order to build rapport with them. (ALJD at 24: 37-38) The ALJ found in her decision that a manager told a senior representative he could not talk about the Union with CSRs while he was supporting them or when he was when he was supposed to be working. ALJD at 16: 16-19) The ALJ found that Respondent was not clear with the senior representative as to when he could speak about the Union while working since his active job

¹ ALJD__:_ refers to page followed by line or lines of the ALJ's decision in JD(SF)-49-15 (December 10, 2015)

encompassed having non-work discussions with CSRs. (ALJD at 16: 16-19) The ALJ found such ambiguities are construed against the promulgator of the rule and ordered appropriate

Respondent also argues that the notice language as written would suggest that Respondent could not prevent employees from discussing Union issues at any point during their work day, like while on call with a customer or discussing a performance issue with their manager. This is simply not true. There is nothing in the notice language that prevents Respondent from revising or promulgating a new rule that addresses its concerns. Respondent's argument to have the language revised to fit what it believes to be less ambiguous does not remedy what was actually promulgated and should be denied.

III. CONCLUSION

Based upon the foregoing, the General Counsel submits that the ALJ correctly ordered appropriate notice language to address the rule unlawfully promulgated by Respondent in violation of Section 8(a)(1) of the Act as set forth above. Accordingly, the General Counsel respectfully urges the Board to reject Respondent's Cross Exception and to adopt the ALJ's findings and recommended order, consistent with General Counsel's Exceptions.

Dated at Albuquerque, New Mexico, this 24th day of February 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS EXCEPTION in T-MOBILE USA, INC., Case 28-CA-148865, was served by E-Gov, E-Filing, and E-Mail, on this 24th day of February 2016, on the following:

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